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Constitutional Law: Court Substitutes Conclusive Presumption Approach for Equal Protection Analysis

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Case Comments

Constitutional Law: Court Substitutes Conclusive Presumption Approach for Equal Protection Analysis

Irritated by abuse of the food stamp program, Congress amended section 5(b) of the Food Stamp Act[1] to deny program eligibility to "[a]ny household which includes a member who has reached his eighteenth birthday and who is claimed as a dependent child for federal income tax purposes by a taxpayer who is not a member of an eligible household."[2] The amendment further specified that this period of ineligibility should extend "during the tax period such dependency is claimed and for a period of one year after expiration of such tax period."[3] Petitioner Murry supported her two sons and ten grandchildren with a monthly payment from her ex-husband of $57.50, of which $11.00 went to purchase $128.00 in food stamps. Declared ineligible for food stamps under section 5(b) because her former husband had claimed her two sons and a grandchild as dependents on his 1971 tax return, Murry joined with others[4] in a class action to enjoin enforcement of this tax dependency provision. A three-judge panel held the provision violative of the fifth amendment because it classified households in a manner bearing no rational relationship to the purposes of either the Act as a whole or the particular provision.[5] The Supreme Court affirmed, *holding* that the provision violated the due process clause of the fifth amendment. *United States Department of Agriculture v. Murry*, 413 U.S. 508 (1973).

1. Act of Jan. 11, 1971, Pub. L. No. 91-671, § 4, 84 Stat. 2049, *amending* 7 U.S.C. § 2014 (1964) (codified at 7 U.S.C. § 2014 (1970)).

2. 7 U.S.C. § 2014(b) (1970), *amending* 7 U.S.C. § 2014(b) (1964).

3. *Id.*

4. Four other petitioners were women whose husbands or former husbands did not live with them but had claimed some or all of their children as dependents. In at least two of these cases, the husbands had not provided any support for the children. Three other petitioners were married individuals whose parents had claimed them as dependents, though they lived in separate households and gave no aid to their children.

5. Murry v. United States Dep't of Agriculture, 348 F. Supp. 242, 243 (D.D.C. 1972). For cases construing other provisions of the Food Stamp Act, see Annot., 13 A.L.R. Fed. 369 (1972).

After a pilot food stamp program inaugurated in 1961 proved successful in increasing the food consumption of the poor and expanding the nation's agricultural markets, Congress passed the Food Stamp Act in 1964 "to permit low-income households to purchase a nutritionally adequate diet through normal channels of trade."[6] Under the program, which is administered by state agencies operating under federally approved plans, eligible households[7] may purchase coupons for a small fee and redeem them in approved stores for food costing a significantly greater amount.

Although the Act, as originally adopted, contained provisions to assure that the availability of food stamps would be restricted to those in need,[8] in the debate over the 1971 revisions several members of Congress expressed concern that stamps were being distributed to non-needy persons.[9] As a result, Congress adopted both the tax dependency provision to prevent college students and children of wealthy parents from obtaining food stamps and a provision excluding any household in which one member is unrelated to any other member[10] to prohibit food stamp assistance to "hippie" communes.[11] The latter provision was declared unconstitutional in *United States Department of Agriculture v. Moreno*,[12] the companion case to

6. 7 U.S.C. § 2011 (1970), *amending* 7 U.S.C. § 2011 (1964). In the declaration of policy, Congress also noted its finding that "increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food."

7. For most households eligibility is determined according to national standards promulgated by the Secretary of Agriculture. Households receiving federally aided assistance remain eligible for as long as that aid is received. *See generally* 7 C.F.R. § 271.1 *et seq.* (1973).

8. Section 14 of the original Act declares it a felony to knowingly use, transfer, acquire, possess, present or cause to be presented for payment or redemption in any unauthorized manner coupons worth $100 or more. The section provides for fines of up to $10,000 and for prison terms of up to five years for violations. If the coupons in question are worth less than $100, the same offenses are declared misdemeanors, the maximum fine is reduced to $5,000 and the maximum prison term is reduced to one year. 7 U.S.C. § 2023(b), (c) (1970).

9. *See* 116 CONG. REC. 41979, 41993, 42002-05 (1970) (remarks of Representatives Latta, May and Foley).

10. Act of Jan. 11, 1971, Pub. L. No. 91-671, § 2 (e), 84 Stat. 2048, *amending* 7 U.S.C. § 2012(e) (1964) (codified at 7 U.S.C. § 2012(e) (1970)).

11. H.R. REP. No. 1793, 91st Cong., 2d Sess. 8 (1970). *See also* 116 CONG. REC. 44439 (1970) (remarks of Senator Holland).

12. 413 U.S. 528 (1973), *aff'g* 345 F. Supp. 310 (D.D.C. 1972).

Murry.[13]

The Court struck down the tax dependency provision as a violation of due process on the twin grounds that the terms of the provision bore no rational relationship to its purpose of fraud prevention and that as a measure of need the provision created a conclusive presumption often contrary to fact. Stating that the provision went far beyond its goal and that "its operation is inflexible,"[14] the Court in regard to the first ground of its holding maintained that a tax dependent's need during the year for which a tax return is filed bears no relation to his need during the following year. Furthermore, the need of the tax dependent in the household bears no relation to the need of the household as a whole. Justices Blackmun and Rehnquist took issue with one or both of these conclusions,[15] with Justice Rehnquist adding that under an equal protection analysis, classifications created by social or economic regulations should not

13. Section 7(a) of the 1971 amendment also added alteration of coupons to the list of offenses for which criminal penalties are imposed and broadened the subject matter of those enumerated offenses to include "authorization to purchase cards." Moreover, section 4 of the amendment excludes from program participation any household with an able-bodied 18 to 65 year old who has not registered for employment or has refused certain types of employment and who is neither responsible for the care of children nor a bona fide student in an accredited school or training program. *See* Act of Jan. 11, 1971, Pub. L. No. 91-671, §§ 4, 7(a), 84 Stat. 2049, 2052, *amending* 7 U.S.C. §§ 2014, 2023(b) (1964) (codified at 7 U.S.C. §§ 2014(c), 2023(b) (1970)).

14. 413 U.S. at 513.

15. Speaking of the relation between a tax exemption claim and the need of the individual claimed during the following year, Justice Rehnquist stated:

> Since income tax returns are not filed until after the termination of the tax year, the carryover provision is the only practical means of enforcing the congressional purpose unless Congress were to establish an administrative adjudication procedure wholly independent of the existing tax collection structure. Such an alternative system would doubtless have its own delays, inefficiencies, and inequities.

Id. at 526. In regard to the same point, Justice Blackmun wrote: "[T]he 'year after' provision is not without rational basis, for Congress, in allocating limited resources, has determined that by this means it recoups in the later year the loss sustained in the earlier year when food stamps were improperly claimed." *Id.* at 521.

Referring to the relationship between the need of an individual and the need of his household, Justice Rehnquist stated:

> The majority does not question that Congress could rationally so choose to dispense welfare benefits to "economic units" rather than to individuals. . . . Since the resources of the household member claimed as a tax dependent are by definition available to the entire household, it is rational to disqualify such units containing ineligible tax dependents.

Id. at 526, n. *.

be invalidated merely because they " 'go beyond the[ir] goal[s].' "[16]

The second ground of *Murry's* invalidation of the tax dependency provision rested on the Court's characterization of the prescribed measure of need as an irrebuttable presumption. Though aggrieved food stamp claimants are entitled to a hearing under the Act, the scope of the hearing is limited to " 'the issue of whether or not a member of the household has been claimed as a dependent child by a taxpayer who is not a member of a household eligible for food assistance . . . .' "[17] As the majority pointed out, such hearings would not determine whether the tax dependency claim was legitimate or, if it was, whether the household might still be in need of food stamps. In response to the majority's position, Justice Blackmun presented a persuasive statutory construction that the amendment applies only to households in which an individual has been legitimately claimed. Cases of wrongful claims, he maintained, could be avoided by expanding the scope of the administrative hearing or resolved

16. *Id.* at 522. Following the substantive due process era in which the Court used due process to strike down social and economic legislation which it thought unwise, equal protection became the preferred ground of reviewing all legislation, and the evaluation of a social or economic regulation became one characterized by judicial restraint. Under this restrained review, a legislative classification must merely represent a reasonably related means to a legitimate governmental purpose. Ferguson v. Skrupa, 372 U.S. 726, 733 (1963) (Harlan, J., concurring); Flemming v. Nestor, 363 U.S. 603, 611-12 (1960); Nebbia v. New York, 291 U.S. 502, 521, 525 (1934). Means generally have been held to be reasonably related to a law's purpose if any state of facts can be conceived to justify them. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Williamson v. Louisiana Optical Co., 348 U.S. 483, 487-88 (1955); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). Personal liberties, however, have continued to find protection in strict review, a second type of equal protection analysis which is used whenever a classification is deemed to be suspect or to burden fundamental rights and which has in many respects assumed the characteristics of the old substantive due process analysis. Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (sex); Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (alienage); Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667, 670 (1966) (right to vote); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (race); Korematsu v. United States, 323 U.S. 214, 216 (1944) (national origin); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (procreation). Under strict review, a classification must represent the only means possible to attain a compelling state interest, an almost impossible test to meet. *See* Kramer v. Union Free School Dist., 395 U.S. 621, 627-28 (1969). *See generally* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 357-65 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1131-32 (1969).

17. 413 U.S. at 512.

by allowing the courts to determine the validity of a particular application of the statute. Such cases need not lead to the complete nullification of the provision. However tenable, Justice Blackmun's interpretation would leave unresolved the problems faced by households which remain needy even after a member has been legitimately claimed as a tax dependent.

By characterizing the tax dependency provision as a conclusive presumption rather than as the statutory limitation on the availability of food stamps urged by Justice Rehnquist, the majority implicitly rejected the district court's equal protection analysis and rested its own holding on procedural due process grounds.[18] Why it should have taken this course is a question

18. Where they are not arbitrary or unreasonable, statutes providing that certain facts shall be prima facie evidence of certain other facts have generally been upheld as within the legislature's power to promulgate rules of evidence. United States v. Gainey, 380 U.S. 63, 66-67 (1965); *cf.* Turner v. United States, 396 U.S. 398, 404-05, 408 (1970); Leary v. United States, 395 U.S. 6, 33-36 (1969); United States v. Romano, 382 U.S. 136, 139 (1965); Tot v. United States, 319 U.S. 463, 467-68 (1943); Bandini Petroleum Co. v. Superior Court, 284 U.S. 8, 18-19 (1931); Manley v. Georgia, 279 U.S. 1, 5-6 (1929); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 82 (1911); Bailey v. Alabama, 219 U.S. 219, 238 (1911); Mobile, Jackson & Kansas City R.R. v. Turnipseed, 219 U.S. 35, 43 (1910). For other cases see Annots., 162 A.L.R. 495 (1946); 86 A.L.R. 179 (1933); 51 A.L.R. 1139 (1927). Irrebuttable presumptions, however, declare certain facts to be conclusive evidence of certain other facts and are thus something of a hybrid of procedural and substantive law. Indeed, Wigmore maintained that such presumptions are not evidentiary at all:

> In strictness, there cannot be such a thing as a "conclusive presumption." Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law. . . .

9 J. WIGMORE, EVIDENCE § 2492 (3d ed. 1940).

Courts which characterize such legislative findings as presumptions, *i.e.*, procedural law compelling a procedural due process analysis, generally find violations of due process if the fact proved is not by virtue of its own force conclusive. Heiner v. Donnan, 285 U.S. 312, 324-25 (1931); Schlesinger v. Wisconsin, 270 U.S. 230, 239-40 (1926). Courts which characterize such findings as legislative classifications or declarations, *i.e.*, substantive law compelling an equal protection or substantive due process analysis, uphold such laws if they are social or economic regulations and if, under the consequent restrained review, they represent means reasonably related to a legitimate legislative end. Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 376-78 (1973); United States v. Carolene Prods., Co., 304 U.S. 144, 147-48, 152 (1938); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911); Bowers v. United States, 226 F.2d 424, 427-29 (5th Cir. 1955); Ellis v. Henderson, 204 F.2d 173, 175-77 (5th Cir. 1953); United States v. Jones, 176 F.2d 278, 288-

made more perplexing by the companion case to *Murry*. There the unrelated household provision was held unconstitutional on equal protection grounds,[19] though the classification in question might as easily have been deemed a presumption as the one in *Murry*.[20] The difference in the two analyses may have proceeded from the Court's willingness to declare the legislative purpose illegitimate in *Moreno*, while in *Murry* it limited its review to the means adopted to achieve a concededly legitimate goal.

In the *Murry* procedural due process analysis, the Court may be seeking an alternative to the limited choice between the strict and restrained reviews afforded by equal protection. A procedural due process analysis is similar to an equal protection means analysis in that both test the method by which a legislative purpose is attained rather than the legitimacy of the purpose itself. The two approaches are dissimilar, however, in the scopes of their analyses. Though a procedural due process analysis is like the strict equal protection review employed when fundamental rights or suspect classes are involved, it may be used even when the subject concerns such quasi-property rights as statutory entitlements[21] which heretofore have led only to restrained equal protection review. A procedural due process approach may thus permit the Court to engage in a more rigorous analysis without the accompanying disadvantages of an equal protection review.

There has been an increasing discontent on the Court with the two-tier equal protection formula represented by the divi-

90 (9th Cir. 1949); City of New Port Richey v. Fidelity & Deposit Co., 105 F.2d 348, 351 (5th Cir. 1939).

19. Though the fifth amendment has no equal protection clause, the equal protection guarantee has been held applicable to federal statutes. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

20. United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 533-34 (1973). The Court might well have interpreted the provision as a conclusive presumption that all participating households in which one member is unrelated to any other member defraud the government by accepting unneeded food stamps. Rather, the unrelated household provision was held to violate the equal protection guarantee not only because the classification bore no reasonable relation to the purposes of the Act or to the prevention of fraud, but also because the provision's independent purpose of depriving "hippie" communes of food stamps—"a bare congressional desire to harm a politically unpopular group"—was not a legitimate governmental purpose.

21. *See* Bell v. Burson, 402 U.S. 535, 539 (1971) (driver's license); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (plaintiff's good name); Goldberg v. Kelly, 397 U.S. 254, 263-64 (1970) (welfare benefits).

sion between strict and restrained review. When the presence of a suspect class or fundamental right requires a strict review, the Court's scrutiny of the law involved is characterized both by a judicial evaluation of the legislative end to determine whether it is "compelling" and by a judicial assessment of alternative means to determine whether the classification actually drawn by the law is a "necessary" means to that end. Both aspects of such a review tend to elevate the Court into a distinctively legislative role, a role reminiscent of substantive due process days. The disadvantages of strict review include not only this transformation of the Court's role but also the dispositional inflexibility which has traditionally accompanied it. Once strict review is invoked, the classification in question will almost always fall. Moreover, that the Court must find or declare a suspect class or fundamental right prior to strict review tends to project such inflexibility into future cases involving similar classes or rights.

A similar inflexibility is reflected in the restrained review which applies in the absence of suspect classes or fundamental rights. Under such review the Court ascertains merely whether the end in question is legitimate and whether *any* state of facts might justify the classification as a means to that end. Thus anything more than a cursory analysis is precluded, at least ostensibly,[22] and the law will almost always stand.

Judicial restlessness with this two-tier formula has manifested itself not only in a reluctance to decree new suspect classes and fundamental rights[23] but also in expressions of concern that the formula unduly restricts explicit judicial analysis to the identification of such classes and rights.[24] Moreover, the

22. *See* Tussman & tenBroek, *supra* note 16, at 367-68:

> [T]he Court must either assume that the legislature is "reasonable" and push the matter no further, or it must determine the reasonableness of the belief by considering the evidence of its truth or falsity. That is, it must attempt to answer the third question—What relation in fact exists between the classes? It is difficult to see that there is any intermediate point between complete deference to legislative fact-finding and independent judicial judgment about the facts. The view that the Court does not concern itself with the truth of a belief but only its reasonableness seems a plausible compromise only if we fail to see that the reasonableness of a belief depends upon the evidence for its truth.

23. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 18-19, 28, 30-35 (1973); Lindsey v. Normet, 405 U.S. 56, 73-74 (1972). *But see* Frontiero v. Richardson, 411 U.S. 677, 682 (1973).

24. *See* Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting).

increasing number of cases in which the Court has invalidated laws under restrained review or without identifying whether it is using strict or restrained review suggests a new willingness to engage in more rigorous analysis.[25]

Both equal protection and procedural due process analyses focus on the classifications which legislatures establish to impose burdens on and dispense benefits to their constituents. But while the gist of the equal protection clause is that persons similarly situated should be treated alike,[26] the essence of the procedural due process guarantee is that certain minimal procedural safeguards must be observed to provide reasonable assurance that an individual actually falls within the established class.[27] Thus an invalidation based on equal protection grounds leads to a more precise drafting of the classification, and an invalidation on procedural due process grounds permits the classification to stand but leads to the introduction of prior administrative hearings.[28] These different results, however, proceed from two approaches which are ostensibly similar. In deciding whether the procedural due process guarantee requires a hearing prior to the deprivation of some interest, courts balance the individual's interest against the governmental interest in speed and efficiency. Recent cases, moreover, suggest that this balancing process will be greatly weighted in favor of the individual. *Bod-*

25. *See generally* James v. Strange, 407 U.S. 128 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). Professor Gunther maintains that the Court, in seeking an alternative to the current two-tier equal protection formula, is moving toward a new means-focused test somewhere between strict and restrained review. Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17-18, 20-24 (1972). Under such a test, the Court would examine closely whether a statutory classification in fact promotes the legislative purpose in question, but would, by using a means-focused test, eschew the interest balancing and purpose evaluation of strict scrutiny. Whether it is possible, however, for the Court to evaluate means without making at least implicit substantive judgments about the end in question is problematic. *See generally* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123 (1972).

26. *See* Tussman & tenBroek, *supra* note 16; *Developments, supra* note 16.

27. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1452 (1968).

28. Morrissey v. Brewer, 408 U.S. 471 (1972); Bell v. Burson, 402 U.S. 535 (1971); Wisconsin v. Constantineau, 400 U.S. 433 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

die v. Connecticut[29] and *Fuentes v. Shevin*,[30] for example, imply that a prior hearing must be granted unless summary adjudication is necessary to achieve "a countervailing state interest of overriding significance."[31] Such a test is comparable to the evaluation of a classification in a strict equal protection review under which a classification will fall unless there is no alternative way to attain a compelling state interest.[32]

In light of this similarity in approach, the *Murry* Court may have viewed procedural due process as a method of invoking strict review without its accompanying inflexibility. While a classification dealing with those eligible for food stamps is the sort of economic regulation which would normally lead to a restrained equal protection review, an individual's interest in food

29. 401 U.S. 371 (1971).
30. 407 U.S. 67 (1972).
31. Boddie v. Connecticut, 401 U.S. 371, 377 (1971).
32. The legislative reasoning behind the tax dependency provision in *Murry* might be paraphrased as follows:
1. If petitioner (*P*)
2. Has been claimed as a tax dependent according to the terms of section 5(b) (possesses trait *A*),
3. Then *P* is ineligible for food stamps (individual interest *B* will be burdened),
4. So as to prevent food stamps from going to non-needy persons (to attain legislative purpose *C*).

Whether *P* possesses trait *A* has traditionally been the inquiry of a procedural due process analysis. The legislature may not conclusively presume from any other fact that *P* does indeed possess *A*. A hearing must be granted, and the necessity for such a hearing prior to the burdening of interest *B* will be determined by balancing *B* against purpose *C*. The issues in this balancing process are whether *C* is of overriding importance and whether summary adjudication is the only way to achieve it.

Whether the classification of individuals according to trait *A* promotes purpose *C*, on the other hand, has traditionally been the inquiry of an equal protection review—a restrained equal protection review if *B* is a property interest. Under restrained review, courts traditionally have not considered the relative weights of *B* and *C*, but have upheld the use of trait *A* if any state of facts might justify the classification as a means to purpose *C*.

By characterizing the attainment of purpose *C* as a result or fact to be conclusively presumed from the possession of trait *A*, the *Murry* Court transformed the inquiry of the procedural due process analysis to the question of whether the burdening of *P*'s interest *B* in fact promotes purpose *C*. It consequently employed a procedural due process approach—the balancing of *B* and *C*—to determine not whether a *prior* hearing should be granted, *i.e.*, whether *summary* adjudication is necessary to achieve purpose *C*, but whether the classification should be more precisely drawn, *i.e.*, whether the current classification is necessary to achieve purpose *C*. Indeed, the analysis may lead to the conclusion that the classification should be abandoned entirely in favor of individualized determinations. *See* notes 40-41 *infra*.

stamps is also the sort of quasi-property interest which is protected by procedural due process.[33] By characterizing the tax dependency provision as a conclusive presumption, the Court was able to invoke the procedural due process guarantee; and by broadening the scope of its analysis, it was able to subject the legislative classification to a strict means scrutiny without declaring either food stamps a fundamental right or college students a suspect class.[34]

This interpretation of *Murry* also explains a developing tendency of the Court to treat legislative findings as statutory classifications when they deal with traditional social or economic regulations[35] but to treat them as conclusive presumptions when they involve either fundamental rights or the kinds of property interests, such as statutory entitlements, which display both economic and noneconomic aspects.[36] Moreover, the willingness to

33. *See* note 21 *supra*.

34. *Cf.* Hastie, *Judicial Method in Due Process Inquiry*, in GOVERNMENT UNDER LAW 326, 337 (A. Sutherland ed. 1956):

> In the field of procedural due process the judge is more at home. He is not required to weigh policy considerations of the kind which underlie substantive legislation. Rather he is deciding whether the devices and procedures adopted by the state and its functionaries in the authoritative settlement of controversies and the official administration of justice are tolerable in our society.

35. *See* Mourning v. Family Publications Servs., Inc., 411 U.S. 356, 376-77 (1973); United States v. Carolene Prods. Co., 304 U.S. 144, 152-54 (1938).

36. Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791, 798-801 (1974); Vlandis v. Kline, 412 U.S. 441, 452 (1973); Stanley v. Illinois, 405 U.S. 645, 656-57 (1972); Dunn v. Blumstein, 405 U.S. 330, 349-54 (1972); Bell v. Burson, 402 U.S. 535, 539-40 (1971); Shapiro v. Thompson, 394 U.S. 618, 631 (1969); Carrington v. Rash, 380 U.S. 89, 96 (1965). This apparent trend on the Court in some ways parallels the development of its attitude toward rebuttable statutory presumptions in criminal cases. Ferry v. Ramsey, 277 U.S. 88 (1928), although not a criminal case, has been cited for the proposition that the test of a criminal presumption's validity is whether the legislature might have made it a crime to commit the act which the jury may permissibly infer from the other acts proved. In Rossi v. United States, 289 U.S. 89 (1933), the Court applied an alternative test, upholding the presumption because it was comparatively more convenient for the defendants to produce the evidence relevant to the proof of the acts presumed. *Cf.* Morrison v. California, 291 U.S. 82 (1934). These two tests seem roughly analogous to the characterization of conclusive presumptions as legislative classifications which will be upheld if it is within the legislature's power, under restrained equal protection review, to adjudge the administrative efficiency which they promote more important than the individual interests at stake. In Tot v. United States, 319 U.S. 463 (1943), however, the first test was rejected and the second test reduced to a corollary of the true rule for determining a criminal presumption's validity. That test is whether, in common life, the fact presumed has a

use procedural due process as a substitute for an equal protection means analysis might shed some light on peculiar cases like *Reed v. Reed*[37] which can best be explained on the basis that the state's interest in judicial efficiency was deemed less important by the Court than the interest of the plaintiff's class in equal treatment.[38] Finally, that the Court decided the companion case to *Murry* on equal protection grounds lends credence to this particular interpretation of *Murry*. In *Moreno*[39] the Court declared the legislative end of discrimination against "hippies" illegitimate and thus could not have fallen back on the means-focused procedural due process analysis to correct the statute's injustice.[40]

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reasonable relationship to the facts proved. *See also* United States v. Romano, 382 U.S. 136 (1965). Moreover, though the cases avoid the issue, there is some recent indication that the Court may be moving toward the requirement that criminal facts presumed must flow from the fact proved beyond a "reasonable doubt." Turner v. United States, 396 U.S. 398, 422-24 (1970). In any event, Ashford and Risinger point out that whether the Court will deem the disputed relationship "reasonable" depends upon whether the presumption casts the burden of production or the burden of persuasion upon the defendant. Ashford & Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 YALE L.J. 165 (1969). These considerations seem roughly equivalent to the Court's apparent weighing of the individual interest at stake when it characterizes a civil statutory provision as a legislative classification or a conclusive presumption. For a discussion of the due process standards for evaluating criminal presumptions suggested by Ashford and Risinger, see Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 DUKE L.J. 919.

37. 404 U.S. 71 (1971).

38. *See* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 151 (1972).

39. *See* note 20 *supra*.

40. Further indication that the Court is, in effect, substituting a procedural due process review for an equal protection means analysis is provided by the recent case of Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791 (1974). In that case the Court, per Justice Stewart, held that a mandatory termination of a school teacher's employment at the end of the fourth or fifth month of her pregnancy violated due process because it bore no reasonable relationship to the purposes it sought to serve and established an irrebuttable presumption that such teachers were physically incapable of continuing their duties. Though the Court did not question the legitimacy of the maternity leave's purpose, it invalidated the regulation because the individual interests at stake outweighed the governmental interest in administrative efficiency and dictated a more individualized determination of physical incompetency. *See* note 32 *supra*. While the individual interest in *LaFleur*—"personal choice in matters of marriage and family life," *Id.* at 796—has been held previously to be a fundamental right, Skinner v. Oklahoma, 316 U.S. 535 (1942), Griswold v. Connecticut, 381 U.S. 479 (1965), the Court nevertheless avoided the opportunity which these precedents afforded

The substitution of a procedural due process for an equal protection means analysis is not, however, an alternative free from either theoretical or practical problems. In the first place, the two grounds of invalidation usually lead to different responses from the legislature. While the appropriate remedy for a law violative of equal protection is a more precise redrafting of the classification, the method of curing a statute violative of procedural due process is the introduction of prior administrative hearings. In this respect the *Murry* Court did not indicate why it did not choose to suggest that the scope of the administrative hearing provided for in the Act be broadened. The case thus differs somewhat from *Vlandis v. Kline*, in which the Court implied that a hearing would be an appropriate alternative to the redrafting of Connecticut's nonresident tuition statute which conclusively presumed certain traits to be identifying characteristics of out of state students.[41] A second and more significant disadvantage of blending procedural due process with equal protection is the theoretical confusion of adjudicative and legislative facts and the resulting confusion of the Court's role vis-a-vis that of the legislature.[42]

The lack of explicit criteria to determine when the Court will characterize a legislative classification as a conclusive presumption and consequently employ the procedural due process analysis to nullify the law emphasizes the practical problems inherent in the *Murry* approach. As Chief Justice Burger pointed out in his dissent to *Vlandis v. Kline*,

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for explicitly invoking strict equal protection scrutiny. Justice Powell concurred in the decision, though maintaining that the case by case interest balancing which the irrebuttable presumption approach apparently entails should be effected under the Equal Protection Clause. 94 S. Ct. at 802. In a vigorous dissent, joined by Chief Justice Burger, Justice Rehnquist attacked Justice Stewart's "unending war on irrebutable [*sic*] presumptions," *id.* at 805, and claimed that the majority's preference for individualized determinations over imperfect legislative classifications constituted "an attack upon the very notion of lawmaking itself." *Id.* at 806.

41. 412 U.S. 441 (1973). The *Vlandis* Court held that due process required the state to permit an individual student the opportunity to rebut the statutory presumption because the presumption was not always true in fact and because hearings represented a reasonable alternative means of making the determination of residency. The *Murry* Court, of course, may have felt that the individual interests at stake merely required a redrafting of the poorly drawn tax dependency provision rather than the introduction of individualized need determinations, but this is not apparent from the opinion. *See also* Cleveland Bd. of Educ. v. LaFleur, 94 S. Ct. 791 (1974).

42. *See* note 32 *supra*.

> literally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be improved on by individualized determinations . . . .[43]

If, for example, legal requirements that doctors attend medical school before practicing medicine or that drivers reach certain ages before obtaining driver's licenses can be characterized as conclusive presumptions, courts may find that occupational pursuit[44] and access to automobiles[45] are individual interests at least as important as food stamp eligibility. It is unclear whether the Court can arrive at standards to determine the relative importance of individual interests without overstepping the bounds of responsible judicial interpretation and usurping a legislative role. On the other hand, if the Court attempts to limit this potential interference with legislative classifications by declaring that the conclusive presumption approach applies only when certain individual rights are involved,[46] it will merely be stating the present requirements for strict review in a different manner. Nevertheless, *Murry* may represent a first step toward the explicit judicial analysis which has been prevented by the present two-tier equal protection formula, but which has probably never been abandoned in actuality. As Justice White stated in his concurring opinion to *Vlandis v. Kline*:

> [I]t is clear that we employ not just one, or two, but, as my Brother MARSHALL has so ably demonstrated, a "spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause." . . . I am uncomfortable with the dichotomy, for it must now be obvious, or has been all along, that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations.[47]

In the blend of due process and equal protection analysis which *Murry* represents, the Court may be moving toward Justice Marshall's view that the "elements of fairness should not be so rigidly cabined"[48] and toward a point midway between the legislative role represented by substantive due process and strict equal protection and the relatively passive role represented by restrained equal protection review.

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43. 412 U.S. at 462 (Burger, C.J., dissenting).
44. *Cf.* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).
45. *Cf.* Bell v. Burson, 402 U.S. 535 (1971).
46. *Cf.* Board of Regents v. Roth, 408 U.S. 564 (1972).
47. 412 U.S. at 458-59 (White, J., concurring).
48. United States Dep't of Agriculture v. Murry, 413 U.S. 508, 519 (1973) (Marshall, J., concurring).

Torts: Joint Venturers' Negligence Must Be Combined Under the Minnesota Comparative Negligence Statute

Plaintiff was injured when she tripped over the raised step of an automatic photo booth located in a department store. She brought an action for damages against the department store, the manufacturer of the photo booth and the booth's distributor, alleging that all three defendants were jointly liable for her injuries. At the close of the trial, the jury found that the parties were negligent in the following proportions: plaintiff—30 percent, defendant department store—30 percent, defendant manufacturer—30 percent and defendant distributor—10 percent. Although the plaintiff was at least as negligent as any individual defendant, the trial court compared her 30 percent negligence to the combined negligence of all the defendants and entered a judgment in her behalf. On appeal, the Minnesota Supreme Court affirmed, *holding* that since defendants who engage in a joint venture are jointly liable, their negligence must be combined and the resulting sum compared to the extent of negligence attributable to the plaintiff in order to determine the plaintiff's right to recover under the Minnesota Comparative Negligence Statute.[1] *Krengel v. Midwest Automatic Photo, Inc.*, 295 Minn. 200, 203 N.W.2d 841 (1973).

In an effort to provide some compensation to injured but negligent plaintiffs, comparative negligence statutes modify the common law defense of contributory negligence which denies recovery whenever a plaintiff is even slightly negligent.[2] To this end the Minnesota statute[3] requires that the jury determine

1. MINN. STAT. § 604.01 (1971).

2. *See, e.g.*, Campbell, *Ten Years of Comparative Negligence*, 1941 WIS. L. REV. 289; Padway, *Comparative Negligence*, 16 MARQ. L. REV. 3 (1931); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Whelan, *Comparative Negligence*, 1938 WIS. L. REV. 465.

3. MINN. STAT. § 604.01(1) (1971). The statute provides:

> Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, *if such negligence was not as great as the negligence of the person against whom recovery is sought*, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering. The court may, and when requested by either party, shall, direct the jury to find separate special verdicts determining the amount of negligence attributable to each party; and the court shall then reduce the amount of damages in proportion to the amount of

the amount of the plaintiff's damages and the percentage of causal negligence attributable to each party.[4] If the plaintiff's negligence is greater or equal to that attributable to the defendant his recovery is completely barred. However, if the defendant is the more negligent of the two, the plaintiff is allowed to recover but his recovery is reduced by an amount equal to the damages found by the jury multiplied by the percentage of his own negligence.[5] The last sentence of the statute provides that where there are several defendants who are jointly liable, each is required to contribute to the plaintiff's recovery an amount equal to his percentage of causal negligence multiplied by the total amount of the plaintiff's damages.[6]

In the instant case, the court held that where several defendants are jointly liable, the statute requires that the percentages of negligence attributable to each of the defendants be added and the resulting sum compared to the extent of the plaintiff's negligence. The plaintiff is allowed to recover where he is less negligent than all the jointly liable defendants combined.[7] The court provided no analysis for its construction of the statute, but rather relied solely on the statute's last sentence which it believed "clearly ma[de] an exception for joint tortfeasors."[8]

The court's interpretation of the comparative negligence statute is subject to challenge on several grounds. First, the

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negligence attributable to the person recovering. *When there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each, provided, however, that each shall remain jointly and severally liable for the whole award.*

(emphasis added). The following examples illustrate the operation of the statute:

(1) Plaintiff (50% negligent) v. defendant (50%)
Result: No recovery because plaintiff's negligence is as great as defendant's.

(2) Plaintiff (55%) v. defendant (45%)
Result: No recovery because plaintiff's negligence is greater than defendant's.

(3) Plaintiff (30%) v. defendant (70%)
Result: Plaintiff recovers and damages are diminished by an amount representing plaintiff's negligence, i.e., plaintiff gets total damages minus 30 percent of total damages.

4. MINN. STAT. § 604.01(1) (1971).

5. *Id.*

6. *Id.* Although each joint tortfeasor may be required to contribute an amount equal to his percentage of the negligence multiplied by the total damages, joint tortfeasors are jointly and severally liable and therefore each remains liable for the total damages.

7. 295 Minn. at 207-08, 203 N.W.2d at 846.

8. *Id.* at 208, 203 N.W.2d at 846.

statute clearly directs a comparison between the extent of the plaintiff's negligence and that attributable to "the person against whom recovery is sought."[9] In *Krengel* there were three such "persons"—the manufacturer, the distributor, and the department store—each of whom participated in the action as a separate party. Since the plaintiff was at least as negligent as any defendant, her recovery should arguably have been barred.[10] This construction of the statute is supported by the Minnesota Legislative Committee Comment which explains that "[i]n cases involving more than one defendant, the plaintiff's negligence is compared to that of *each defendant separately*, and he can recover only from the defendant or defendants whose negligence exceeds his own."[11]

Second, the court's reliance on "an exception for joint tortfeasors" contained in the last sentence of the statute ignores the language and purpose of that sentence. The sentence in relevant part provides, "[w]hen there are two or more persons who are jointly liable, contributions to awards shall be in proportion to the percentage of negligence attributable to each."[12] The court interpreted this language to require that the extent of negligence attributable to each of several jointly liable defendants be combined for the purposes of determining the plaintiff's right of recovery. However, the sentence by itself provides no standard for determining who is "liable." Whether there are any persons who are "liable" is determined by the earlier portion of the statute which allows recovery only against defendants who

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9. MINN. STAT. § 604.01(1) (1971).

10. *Id.*

11. More fully set out, the Committee Comment on MINN. STAT. § 604.01(1) (1971) at 38 M.S.A. 143 (Supp. 1974) provides:

> The Minnesota Comparative Negligence Statute is based on Wisconsin Law. The first sentence of our statute is identical to Wisconsin Statute 331.045 adopted in 1931. Wisconsin case law was carefully researched and evaluated with the result that the balance of the Minnesota statute is based on that source. . . . The primary distinguishing feature of the new law is the language found in the first sentence which provides that a person can recover damages only when his "negligence was not as great as the negligence of the person against whom recovery is sought". The plaintiff's negligence is compared to that of the defendant and the plaintiff can only recover if he is less than 50% negligent. *In cases involving more than one defendant the plaintiff's negligence is compared to that of each defendant separately and he can recover only from the defendant or defendants whose negligence exceeds his own.*

(emphasis added).

12. MINN. STAT. § 604.01(1) (1971). For the full text of the statute see note 3 *supra*.

are individually more negligent than the plaintiff.[13]

Contrary to the court's interpretation, the purpose of the last sentence of the comparative negligence statute was not to set a new standard of liability for joint tortfeasors, but rather was to provide a basis for contribution among them. Except for the last sentence, the Minnesota statute is based on the Wisconsin Comparative Negligence Statute,[14] which, because it lacked a statutory guide to co-defendants' rights of contribution, gave the Wisconsin Supreme Court difficulty whenever it was faced with claims against joint tortfeasors.[15]

Since the Minnesota legislature relied heavily on the Wisconsin statute and its attendant case law when the Minnesota statute was drafted, the final sentence is arguably no more than an attempt to avoid the problems concerning contribution experienced by Wisconsin. That this is the sole purpose of the sentence is supported by the Legislative Committee Comment which states:

> [t]he final sentence states that plaintiff can recover the total amount of his damages from any one tort-feasor, since each is jointly and severally liable. This sentence goes on to provide that as between joint tort-feasors there is contribution in "proportion to the percentage of negligence attributable to each."[16]

Despite the weaknesses in the court's interpretation of the comparative negligence statute, there are compelling arguments which ultimately justify the *Krengel* result. First, the result is consistent with the interpretation given the Wisconsin statute by the Wisconsin Supreme Court. The Wisconsin court construed that statute as requiring that the extent of negligence attributable to individual defendants be combined in cases where the defendants had a joint duty to the plaintiff.[17]

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13. *Id.*

14. Wis. Laws 1931, ch. 242, *as amended* WIS. STAT. § 895.045 (1971).

15. *See* Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962). In *Bielski* the Wisconsin court arrived at the result codified in the last sentence of MINN. STAT. § 604.01(1) (1971)—apportionment among joint tortfeasors is to be determined by their percentages of negligence.

16. Committee Comment on MINN. STAT. § 604.01(1) (1971) at 38 M.S.A. 143 (Supp. 1974).

17. *See* Schwenn v. Loraine Hotel, 14 Wis. 2d 601, 111 N.W.2d 495 (1961); Reber v. Hanson, 260 Wis. 632, 51 N.W.2d 505 (1952). In *Schwenn*, the plaintiff sued defendant hotel and defendant cab company for injuries sustained in a fall on an icy driveway in front of the hotel. The jury found plaintiff 33⅓ percent negligent and defendants 66⅔ percent negligent as a unit. The Wisconsin court reversed under the comparative negligence statute, Wis. Laws 1931, ch. 242, holding that a joint duty did not exist as a matter of law and that the negligence of defendants could not be combined. The court commented:

Second, and of far greater importance, the words "person" and "defendant" as used in the Minnesota statute and Committee Comment are not inconsistent with the combination of the defendants' negligence in the instant case. For example, in the definitional section of the Minnesota Uniform Partnership Act, the word "person" has been defined to include "individuals, partnerships, corporations, *and other associations.*"[18] Since the three defendants in the instant case were engaged in a joint venture when the plaintiff was injured, they made up a single association acting against her interests and were accurately termed a "person" in the context of tort liability. Thus the plaintiff was confronted with a single photo booth operated by a single joint economic venture and not with the separate products of three distinct defendants.

Furthermore, MINNESOTA STATUTES § 540.151 provides that when "two or more persons associate and act" together, they may be sued under their common name and a judgment may be collected against their "joint or common property."[19] The *Krengel* result is analagous to the result reached under section 540.151 in that it permitted three corporations which acted in concert to be considered a single defendant for the purposes of determining their tort liability even though, procedurally, they

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> [T]he comparison of negligence in a multiple defendant case is required to be between the plaintiff and the individual defendants. (citations omitted). Otherwise, it would be possible for a plaintiff to recover from a defendant less negligent than himself. We cannot believe the legislature intended such a result. . . . Even if the duty . . . to maintain the driveway safe were considered equal, the opportunity to so maintain it may or may not have been equal. The hotel had someone on duty at the driveway at all times, while the cab company employees might be there only sporadically, especially if the taxi business was good. This is a matter for the jury.

14 Wis. 2d at 609-10, 111 N.W.2d at 500. The *Krengel* court did not hesitate to find a joint venture and therefore joint liability as a matter of law, noting that any right to a trial by jury of the issue had been waived. 295 Minn. at 210, 203 N.W.2d at 847.

18. MINN. STAT. § 323.02(4) (1971) (emphasis added).

19. MINN. STAT. § 540.151 (1971). More fully set out, the statute provides:

> [W]hen two or more persons associate and act, whether for profit or not, under the common name, including associating or acting as a labor organization or employer organization, whether such common name comprises the names of such persons or not, they may sue in or be sued by such common name, and the summons shall be served on an officer or a managing agent of the association. The judgment in such cases shall accrue to the joint or common benefit of and bind the joint or common property of the associates, the same as though all had been named parties to the action.

See also MINN. STAT. § 540.15 (1971).

could not have been sued under a common name. The economic reality that a single association was responsible for the plaintiff's injuries should not be obscured by the fact that the action involved three corporate defendants.

Third, the *Krengel* holding will make it easier to settle disputes in a single law suit. If combination of the negligence attributable to joint tortfeasors were not permitted, plaintiffs would be encouraged to sue joint tortfeasors separately, hoping that each would be found to be more than 50 percent negligent. This, in turn, would encourage liable defendants to seek contribution and indemnity from their fellow joint tortfeasors. *Krengel* encourages the joinder of all joint tortfeasors in a single lawsuit in which the respective liability of all parties can be finally determined.

While the *Krengel* result is consistent with the purposes of the Minnesota Comparative Negligence Statute and can be justified under a liberal reading of the statutory language, the holding does present a severe danger. Although the court has subsequently stated that it will confine the holding in *Krengel* to situations where a joint economic venture exists,[20] courts will be pressured to find a joint venture whenever the defendants have even the slightest association.

A strong indication of the extent of this danger can be found in the court's holding that the manufacturer of the photo booth was engaged in a joint venture with the distributor and the department store. Despite the court's assertion that all defendants had some control over the operation of the photo booth, the evidence merely established that the manufacturer sold the booth

20. Marier v. Memorial Rescue Service, Inc., 207 N.W.2d 706 (Minn. 1973). In *Marier* the court refused to combine the negligence of two drivers whose concurrent acts caused plaintiff's injury. The court distinguished *Krengel*, stating:

> In that case [*Krengel*], we held that where several defendants were engaged in a joint economic adventure and a plaintiff is injured while using the product of that joint adventure, a common entity is created "whose members for liability purposes, are indistinguishable." (citation omitted). . . . This portion of our statute [*i.e.*, the final sentence of MINN. STAT. § 604.01 (1) (1971)] does not appear in the Wisconsin statute. Our holding in the Krengel case established that, under certain fact situations, the defendants may be treated as a unit for purposes of comparative negligence. We decline to expand this unitary concept to the situation where the defendants involved are concurrently negligent but do not meet the tests provided in the Krengel case for establishing joint liability. Such an extension would clearly be a change in the substantive rule established by our statute and is properly a function of the legislature.

207 N.W.2d at 709.

to the distributor and that it had a contract with the department store owner which provided that it would be the exclusive manufacturer of photo booths for the department store chain.[21] The court found this evidence sufficient to establish that the manufacturer had a proprietary interest in and a right of control over the "photo booth" enterprise.[22] However, the court did not comment upon other evidence which suggested that only the department store and the distributor had responsibility for the actual operation of the photo booth enterprise, and that the department store and the distributor did not share the proceeds from the operation of the booths with the manufacturer.[23]

Thus, it appears from the court's holding that an exclusive supplier agreement may be sufficient to make a manufacturer part of a joint venture even though the manufacturer has no interest in the proceeds from the use of its product after the sale. Where this is the case, the manufacturer may be held liable for its own negligence *combined with* the negligence of other joint venturers. Sellers and franchisers should heed this warning and be aware that there will be pressure exerted upon courts to hold them responsible for the negligent acts of their remote business associates.

21. 295 Minn. at 203, 203 N.W.2d at 843-44.
22. *Id.* at 209-10, 203 N.W.2d at 847.
23. *Id.* at 203, 203 N.W.2d at 843-44.